Refreshers Course on Payment to Non-Residents
ICAI – Pune Branch

Form 15CB – Law and Practice with specific focus on Multilateral Instruments(MLI) and TDS applicability on specific transactions

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Section 195 – Framework

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Section 195 (1) – Elements

- ✓ **Any person ****
- ✓ responsible for paying to a non-resident, not being a company, or to a foreign company,
- ✓ any interest (not being interest referred to in section 194LB or section 194LC) or section 194LD or **any other sum chargeable under the provisions of this Act (not being income chargeable under the head "Salaries")**
- ✓ shall, **at the time of credit of such income to the account of the payee or at the time of payment ## thereof whichever is earlier**
- ✓ in cash or by the issue of a cheque or draft or by any other mode,
- ✓ deduct income-tax thereon at the **rates in force"**

** Explanation 2 – Obligation to make deduction applies to all persons**, resident or non-resident,** whether or not the non-resident person has -
(i) a residence or place of business or business connection in India; or
(ii) any other presence in any manner whatsoever in India.

##Explanation 1 - Where any interest or other sum as aforesaid is credited to any account, whether called "**Interest payable account**" or "**Suspense account**" or by any other name, in the books of account of the person liable to pay income, such crediting **shall be deemed to be credit of such income to the account of the payee** and the provisions of this section shall apply accordingly.

Section 195 (1) – Elements

Sect. 2(37A) Rates in force, Sub-clause (iii) –

For the purposes of deduction of tax under section 195,

- the rate or rates of income-tax specified in this behalf in the **Finance Act of the relevant year** or

- the rate or rates of income-tax specified in an agreement entered into by the Central Government **under section 90**, or an agreement notified by the Central Government under section 90A, whichever is applicable by virtue of the provisions of section 90, or section 90A, as the case may be.

Rule 26 - Rate of exchange for the purpose of deduction of tax at source on income payable in foreign currency.

Rate of exchange shall be the **Telegraphic Transfer (TT) Buying Rate** of such currency **as on the date** on which **tax is required to be deducted at source**

Explanation : **TT Buying Rate** means the rates of exchange adopted by the **State Bank of India** for buying such currency

[2015] 56 taxmann.com 238 (Delhi - Trib.) - Deduction of tax at source on a single transaction is contemplated at **earlier of dates of credit or payment to payee** it is **not on both occasions** once deduction of tax at source has been made at time of credit, which event occurs first, then there can be no question of once again making deduction of tax at source on full or in part at time of payment

Section 195 (1) – Elements

Controversy – Paid Vs Payable

TDS shall be **at the time of credit of such income to the account of the payee or at the time of payment thereof whichever is earlier**

However many DTAA creates the charge for income only after payment by Resident to Non resident.

Paid –defined under Section 43(2) of the Income-tax Act 1961 –

'Paid' means actually paid or incurred according to the method of accounting

Interplay of Article 3(2) and terms defined under domestic laws

Favourable decision for taxation on payment basis

1. Siemens Aktiengesellschaft (2012) Bom HC: India-Germany DTAA and other decisions
2. InziControl India Ltd. (2018) Chen AT

Sections 195(2), 195(3), 195(6) and 197 – Concept, theory and practice

	Sect. 195(2)	Section 195(3)	Sect. 197
Application by	Payer	Recipient under Rule 29B* (explained in subsequent slides)	Recipient
Purpose	To determine the appropriate proportion of sum chargeable as income	No deduction of tax	No deduction/ deduction at lower rate
Applicability	All payments	Specified receipts	All receipts
Forms	Form 15 E and Rule 29BA proposed in December 2019 (FA2019- amendments)	Form 15C – Bank branches Form 15D – Other than bank branches	Form 13
Whether appealable?	Appeal u/s 248 denying liability to deduct tax after	No appeal	No appeal
Is there any overlap between Section 195 (6) dealing with Form 15CA and Form 15CB with these 3 sections ?			
Finality of Certificate issue by tax department U/s 195/197 - Bombay HC – 245 ITR and recent judgment of Bombay HC in Indostar Capital in 2019 states that the certificate is not final and AO has authority to verify during the course of assessment			

Sect. 195(2) – Interplay with Sect. 195(1)

Gross vs NET

Transmission Corporation, of AP Ltd. v. CIT [1999] 105 Taxman 742/239 ITR 587 (SC)

- If the payment includes income embedded therein, tax has to be deducted on the entire payment. However, it is open to the payee to take recourse to section 195(2) of the Income Tax Act 1961 for determination by the AO for determination of appropriate proportion of such sum so chargeable, or for grant of certificate authorising recipient to receive the amount without deduction of tax, or deduction of income-tax at any lower rates or no deduction.

GE India Technology Cen. (P.) Ltd. v. CIT [2010] 193 Taxman 234

- Sect. 195(2) gets attracted only in cases where the payment made is a composite payment in which certain proportion of payment has an element of 'income' chargeable to tax in India

Position in the case of capital gains? Whether CA Certificate possible on net amount or compulsory recourse to Sect. 195(2)?

Recourse to Sect. 195(2), AO route, no TDS on net amount sou- moto
Syed Aslam Hashmi v. ITO [2012] 26 taxmann.com 6/[2013] 55 SOT 441 (ITAT - Bang.)
R Prakash v. ITO (IT) [2013] 38 taxmann.com 123/[2014] 64 SOT 10.

Sect. 195(2) – Interplay with Sect. 195(1)

Gross vs NET

TDS on net amount based on CA Certificate
Anusha Investments [2017] 88 taxmann.com - No need to approach AO u/s 195(2), CA Certificate possible based on Nil TDS position – [PS: this was a case of capital loss, therefore the whole income was not taxable]
CBDT Instructions – Instruction No. 2/2014 [F.NO. 500/33/2013-FTD-I], Dated 26-2-2014, The AO to determine the appropriate proportion of the sum chargeable to tax under section 195 (1) to ascertain the tax liability on which the deductor shall be deemed to be an assessee in default under section 201 of the Act, **and the appropriate proportion of the sum will depend on the facts and circumstances of each case taking into account nature of remittances, income component therein or any other fact relevant to determine such appropriate proportion**

Sect. 195(3) read with Rule 29B

- **Applicability**
  - Person entitled to receive interest, other sums, on which income-tax has to be deducted under section 195
  - Application to receive **without deduction of tax** in respect of income of the following concerns
    - **Banking company not an Indian company** nor a company which has made the prescribed arrangements for the declaration and payment of dividends within India) and which carries on operations in India through a branch → banking company (any income by way of interest, **or any other sum, not being dividends** *
    - Other person who carries on a business or profession in India **through a branch**, → any sum, **not being interest or dividends** *
  - Subject to conditions enlisted in the subsequent slides (receivable by such branch on its own account and not on behalf of its head office or any branch situated outside India)
  - Conditions referred to in sub-rule (1) are the following, namely-
    - **Banking company**
      - person has been regularly assessed to income-tax in India
      - has furnished the returns of income for all assessment years
      - not in default or deemed to be in default in respect of any tax
    - Other person (additional conditions)
      - he has been carrying on business or profession in India continuously for a period of more than five years immediately preceding the date of the application
      - the value of the fixed assets in India of such business or profession exceeds Rupees Fifty lakhs

Sect. 195(6) read with Rule 37BB

Sect. 195 (6) – Person responsible for paying to a non-resident, not being a company, or to a foreign company, any sum, whether or not chargeable under the provisions of this Act, shall furnish the information relating to payment of such sum, **in such form and manner, as may be prescribed.**

Rule 37BB - Furnishing of information for payment to a non-resident, not being a company, or to a foreign company

Sub-rule 1 of Rule 37BB

37BB . ***(1) The person responsible for paying to a non-resident, not being a company, or to a foreign company, any sum chargeable under the provisions of the Act, shall furnish the following,***

Situation	**Relevant Part of Form 15CA**
Amount of payment or aggregate of payments during the financial year does not exceed **five lakh rupees**	Part A of Form No.15CA
Certificate from AO under Sect. 197 **or** Order under Sect. 195(2) or (3)	Part B of Form No.15CA
Certificate in Form No 15CB from an accountant as defined in Explanation of Section 288 (2)	Part C of Form No.15CA
Any sum which is not chargeable under the provisions of the Act **(Without any value threshold)**	Part D of Form No.15CA

No information is required to be furnished for any sum which is not chargeable under the provisions of the Act, if,— Remittance by Individual not requiring RBI approval and Specified payments in Sub rule 3 (33 Nature of payments)

Sect. 195(6) read with Rule 37BB

Rule 37BB contd.

- ✓ Sub-rule 3 : List of transactions in respect of which no information is required to be furnished for any sum which is not chargeable under the provisions of the Act, if -
  - **Specified list** (includes **payment towards imports including advance payments against imports , business travel, equity investment, advances etc)**
  - Remittances by individuals and not requiring prior approval of RBI read with Schedule III to the Foreign Exchange (Current Account Transaction) Rules, 2000
- ✓ Sub-rules 4 to 8 – Procedural aspects (digital signing, prints etc.)

Section 271-I : Penalty for failure to furnish information or furnishing inaccurate information under section 195

If a person, who is required to furnish information under Section 195 (6), fails to furnish such information, or furnishes inaccurate information, the Assessing Officer may direct that such person shall pay, by way of penalty, **a sum of one lakh rupees.**

Section 273B: No penalty imposable on the person or assesse if he proves that there was reasonable cause for the said failure.

Section 197 – Procedure for online application

Notification No.74/2018 dated 25.10.18
Rule 28AA

Creating Profile on TRACES (taxpayer login)

Electronic submission of Form 13 (subsequent slide)

Use of Digital Signature Certificate or through Electronic Verification Code

Status
Residential Status
PAN
Email ID
Mobile
Existing Liability under Income Tax Act
Previous Year Estimated Total Income
Total Tax
Details of Exempt Income

Details of Advance Tax
Declaration of exempt income
ROI status for 4 years prior

Section 206AA read with Rule 37BC

Sect. 206AA (1)

- ✓ **Notwithstanding** anything contained in any other provisions of this Act,
- ✓ any person entitled to receive any sum or income or amount,
- ✓ on which tax is deductible under Chapter XVIIB
- ✓ shall furnish his Permanent Account Number to the person responsible for deducting such tax,
- ✓ failing which tax shall be deducted at the higher of the following rates, namely

  (i) at the rate specified in the relevant provision of this Act; or

  (ii) at the **rate or rates in force**; or

  (iii) at the rate of **twenty per cent ***

** for Sect. 194-O "5 per cent"*

Sect. 206AA(7)

Relaxation to foreign companies and non-residents

- ✓ The provisions of this section shall not apply to a non-resident, not being a company, or to a foreign company, in respect of –

  i. payment of interest on long-term bonds as referred to in section 194LC; and

  ii. any other payment subject to such conditions as may be prescribed.

Section 206AA read with Rule 37BC

Rule 37BC

In the case of a non-resident, not being a company, or a foreign company and not having permanent account number the provisions of section 206AA shall not apply in respect of payments in the nature of

1. **interest,**
2. **royalty,**
3. **fees for technical services and**
4. **payments on transfer of any capital asset,**

subject to the deductee furnishing the details and the documents specified as under

(i) name, e-mail id, contact number;

(ii) address in the country of residence;

(iii) **Tax Residency Certificate from Government of that country (explained later);**

(iv) Tax Identification Number.

Note: Dividends are not covered under the relaxation under Rule 37BC – Impact ?

Section 206AA – Practical Issues for discussion

Issue # 1 : Does Section 206AA override Section 90 and in turn tax treaties?

Serum Institute of India Ltd. [2015] 56 taxmann.com 1 (Pune - Trib) (HC dismissed revenue's appeal)
Infosys BPO Ltd.[2015] 60 taxmann.com 465 (Bangalore - Trib.)
Tetra Pak India (P.) Ltd. [2019] 111 taxmann.com 205 (Pune - Trib.)
Uniphos Environtronic (P.) Ltd. [2017] 79 taxmann.com 75 (Ahmedabad - Trib.)

- ✓ Section 206AA is not a charging section but is a part of a procedural provisions dealing with collection and deduction of tax at source. Provisions of section 195 which cast a duty on the assessee to deduct tax at source on payments to a non-resident cannot be looked upon as charging provisions.
- ✓ It would be quite incorrect to say that, though the charging section 4 of the Act and section 5 of the Act dealing with ascertainment of total income are subordinate to the principle enshrined in section 90(2) of the Act but the provisions of Chapter XVII-B governing tax deduction at source are not subordinate to section 90(2) of the Act.
- ✓ In view of schematic interpretation of the Act, section 206AA of the Act cannot be understood to override the charging sections 4 and 5 of the Act.
- ✓ Thus, where section 90(2) of the Act provides that DTAAs override domestic law in cases where the provisions of DTAAs are more beneficial to the assessee and the same also overrides the charging sections 4 and 5 of the Act, which, in turn, override the section 206AA of the Act

Section 206AA – Practical Issues for discussion

Issue # 2 : No PAN at the time of remittance, but PAN obtained later, rate to be applied in the Return of Income for refund?

Calderys France [2017] 84 taxmann.com 301 (Pune - Trib.)	→	**Allowed**

Issue # 3 : Surcharge or education cess levied on 20%

Computer Sciences Corporation India (P.) Ltd [2017] 77 taxmann.com 306 (Delhi - Trib.)	→	**Not to be levied**

Section 206AA –
Practical Issues for discussion

Interplay of Section 195A vis-à-vis Section 206AA and impact on net of tax contracts

Section 195A – "where under an agreement, the tax chargeable on is borne by the person by whom the income is payable, then, for TDS, income to be increased to an amount equal to, after TDS on income be equal to the net amount payable under such agreement or arrangement. In simple words, if payer has agreed to bear tax liability, income would be grossed up for TDS purpose.

Example – Amount payable to NR is 100. TDS rate 10%, Grossed up amount – 100*100/90

Issue in view of Sect. 206AA –

Is grossing up required in case payment is made net of tax to a foreign company @ 20% where provisions of section 206AA is applicable

Income could be grossed up using the applicable rate; example 10% and tax could be withheld at 20%

For example: say total amount to be paid net of tax as per agreement be INR 100. Income increased to INR 111.11 -(grossed by 10%). Tax needs to be withheld @ 20% on 111.11 = 22.22

Bosch Ltd v. ITO [2013] 141 ITD 38 (Bangalore ITAT)

Section 90(4) - Tax Residency Certificate

Section 90 (4) – Non residents would not be entitled to claim any relief under tax treaties unless a **Tax Residency Certificate** is obtained

Section 90 (5) – Such non-residents are required to provide such other documents and information**, as may be prescribed**

Rule 21AB

Form 10F to be furnished under Section 90(5) containing the following details -

- ✓ Status (individual, company, firm etc.) of the assessee;
- ✓ Nationality (in case of an individual) or country or specified territory of incorporation or registration (in case of others);
- ✓ Assessee's tax identification number
- ✓ Period for which the residential status, as mentioned in the TRC; and
- ✓ Address of the assesse

TRC for an assessee resident in India

Sub-rule (3) - An assessee, being a resident in India may make an application in Form No. 10FA to the Assessing Officer.

Sub-rule (4) - The Assessing Officer shall issue a certificate of residence in respect of the assessee in Form No. 10FB

Interplay of Section 206AA and TRC provisions – Practical Scenarios

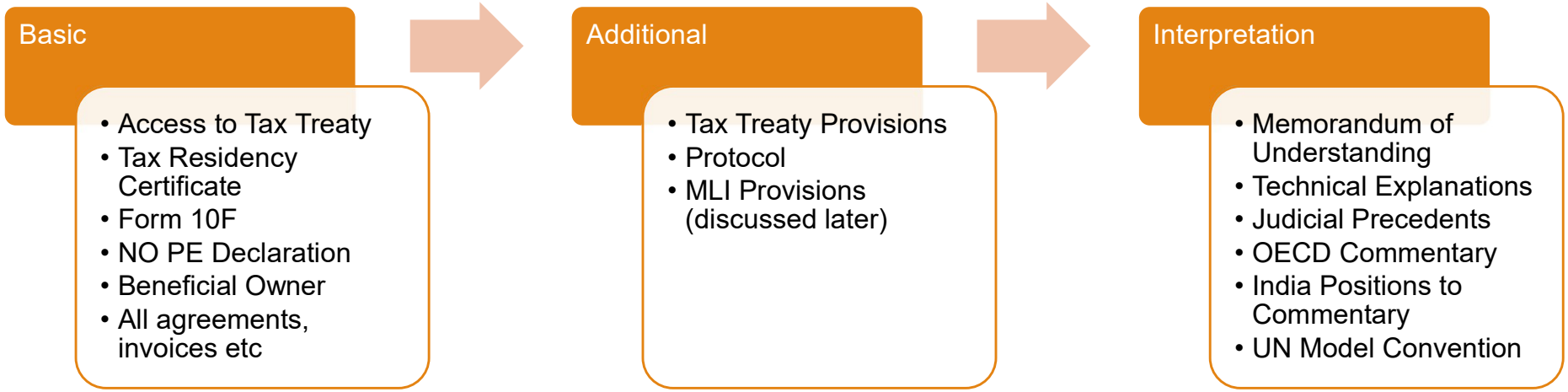
PAN	Tax Residency Certificate	Rate ?
Available	Available	As per DTAA
Available	Not Available	As per ITA
Not Available	Available	As per DTAA
Not Available	Not Available	20%

Tax Residency Certificate – Issues

Issue # : Is Tax Treaty Entitlement a rigid requirement

Skaps Industries India (P.) Ltd. [2018] 94 taxmann.com 448 (Ahmedabad - Trib.)	✓ Provisions in Section 90(4) do not start with a obstante clause vis-à-vis Section 90(2). ✓ Cannot be construed as limitation to, or rider to, somewhat unqualified treaty override stipulated in Section 90(2) and superiority of treaty over the domestic law. ✓ The manner in which it can be construed as a beneficial provision to the assessee is that once this provision is complied with and that the assessee furnishes the TRC in the prescribed format, the Assessing Officer is denuded of the powers to requisition further details in support of the claim of the assessee for the related treaty benefits.
Sreenivasa Reddy Cheemalamarri vs ITO (Hyd ITAT) (TS-158-ITAT-2020)	✓ If the assessee provides sufficient circumstantial evidence the requirement of section 90(4) ought to be relaxed. ✓ Though the Act mandates Tax Residency Certificate of Austria, non-production of the same shall not lead to non grant of treaty benefit

Checks for applying tax treaty provisions



Payment for Imports

- As per **Rule 37BB(3),** payment for imports is covered under the exempted category; which implies no reporting requirements are applicable in respect of payment of imports
- However, in a recent decision, of **Indore ITAT**, in the case of **Sanghvi Food Private Limited (TS 260-ITAT-2020),** it was held that Sect. 195 is applicable in respect of purchase of spare parts from the foreign company. The point raised by the A O and also upheld by the ITAT, that the foreign company had a business connection in India in the form of its Indian subsidiary and therefore income of the foreign company is taxable in India.
- Caution to be exercised while dealing with transactions of imports

How to interpret this decisions and the taxation logics in this judgment?

Whether caution is required for all the import payments?

What is the golden rule to achieve the final outcome?

Part II - MLI – Concepts and Impact on withholding

MLI Impact to Major trading partners

Country	Interest	Dividend	Royalty/FTS	PE	DPS	IPS	Transparent Entities
USA	???	???	???	???	???	???	???
UK	???	???	???	???	???	???	???
Germany	???	???	???	???	???	???	???
Singapore	???	???	???	???	???	???	???
Mauritius	???	???	???	???	???	???	???
France	???	???	???	???	???	???	???
Netherlands	???	???	???	???	???	???	???
Switzerland	???	???	???	???	???	???	???
Japan	???	???	???	???	???	???	???
Canada	???	???	???	???	???	???	???
China	???	???	???	???	???	???	???

ENTRY INTO FORCE - Timeline of MLI

Entry into Force of the MLI

- For the first five countries that ratify MLI :

1st day of the month following the expiry of 3 calendar months after the deposit of 5th instrument of ratification, acceptance or approval

- For countries that ratify subsequently :

1st day of the month following the expiry of 3 calendar months following the date of deposit by the country of its instrument of ratification, acceptance or approval

5th country Deposit date – 22 March 2018
Expiration of 3 months – 22 June 2018
MLI entered into Force – 1 July 2018

Date of deposit for India : 25 June 2019
Expiration of 3 months – 25 Sep 2019
Entry into force in India : 1 October 2019

ENTRY INTO EFFECT

For withholding taxes - First day of the calendar year* that begins on or after latest of dates on which the MLI entered into Force in each jurisdiction (Reference Date)

For other taxes – Taxable period beginning on or after expiration of 6 calendar months from the latest of dates on which the MLI entered into Force in each jurisdiction (Reference Date)

**substituted for taxable period by India*

ENTRY INTO EFFECT – Different Scenarios

Particulars	Singapore	Australia	Russia
India Date of Ratification	25-Jun-19	25-Jun-19	25-Jun-19
Date of Ratification of other country	21-Dec-18	26-Sep-18	18-Jun-19
A. Entry into Force of MLI for India	1-Oct-19	1-Oct-19	1-Oct-19
B. Entry into Force of MLI for XXX Country	1-Apr-19	1-Jan-19	1-Oct-19
C. Relevant date of determining Entry into Effect for India DTAA (later of A or B)	1-Oct-19	1-Oct-19	1-Oct-19
D. Entry into Effect for India			
- Withholding tax	1-Apr-20	1-Apr-20	1-Apr-20
- Other tax	1-Apr-20	1-Apr-20	1-Apr-20
E. Entry into Effect for other countries (calendar year)	Year - Calendar Year	Year - July to June	Year - Calendar Year
- Withholding tax	1-Jan-20	1-Jan-20	1-Jan-20
- Other tax	1-Jan-21	1-July-20	1-Jan-21

Notification 57 dated 09.08.2019 /

(post press release by CBDT on 02.07.2019)

Whereas the Multilateral Convention to Implement Tax Treaty related Measures to Prevent Base Erosion and Profit Shifting (hereinafter referred to as the "the said Convention") was signed by India at Paris, France on the 7th day of June, 2017;

And whereas, the said Convention entered into force on the 01st day of July, 2018, being the first day of month following expiration of three calendar months beginning on the date of deposit of the fifth instrument of ratification, in accordance with para 1 of Article 34 of the said Convention;

And whereas, India had ratified the said Convention and had deposited the instrument of ratification along-with the list of Covered Tax Agreements, reservations and notifications (hereinafter referred to as "India's Position under the said Convention") to the Depositary as in Article 39 of the said Convention, on the 25th day of June, 2019;

And whereas, the date of entry into force of the said Convention for India is the 01st day of October, 2019, being the first day of the month following the expiration of a period of three calendar months beginning on the 25th day of June, 2019 being the date of deposit by India of the instrument of ratification, in accordance with para 2 of Article 34 of the said Convention;

And whereas, the provisions of the said Convention shall have effect in India with respect to a Covered Tax Agreement in accordance with provisions of Article 35 of the said Convention; Now, therefore, in exercise of the powers conferred by sub-section (1) of section 90 of the Income-tax Act, 1961 (43 of 1961), the Central Government hereby notifies that the provisions of the said Convention shall be given effect to in the Union of India, in accordance with India's Position under the said Convention, as set out in the Annexure hereto.

Applicability of MLI

For Instruments deposited before 30th June 2019

Relevant Date: 1 October 2019

Withholding Applicable Date : 1 April 2020

Other Taxes : 1 April 2020

Sr. No.	Country
1.	Austria
2.	Australia
3.	Belgium
4.	Finland
5.	France
6.	Georgia
7.	Ireland
8.	Israel

Sr. No.	Country
9.	Japan
10.	Lithuania
11.	Luxembourg
12.	Malta
13.	Netherlands
14.	New Zealand
15.	Poland
16.	Russia

Sr. No.	Country
17.	Serbia
18.	Singapore
19.	Slovenia
20.	Slovak Republic
21.	Sweden
22.	UAE
23.	UK

Applicability of MLI

For Instruments deposited after 1 July 2019

Withholding Applicable Date : 1 April 2020

Other Taxes : 1 April 2021

Sr. No.	Country	Date of Deposit	Entry into Effect
1.	Canada	20.08.19	01.12.19
2.	Denmark	30.09.19	01.01.20
3.	Iceland	26.09.19	01.01.20
4.	Latvia	29.10.19	01.02.20
5.	Norway	17.07.19	01.11.19
6.	Ukraine	08.08.19	01.12.19

MLI EIF and EIE – Impact

(Application for FY 2020-21 for MLI instruments deposited post June 2019 till 31st march 2020)

View – 1 – WHT and Other tax gets triggered only as per the rule applicable to Other taxes since Section 195 requires to withhold the tax which is required to be paid by the Payee (tax on income earned by payee)	
Withholding Tax Applicable Date	1st April 2021
Other Taxes Applicable Date	1st April 2021

View 2 - WHT and Other tax gets triggered only as per the rule applicable to WHT (earlier date) since Section 195 requires withholding on all the payments to Non resident	
Withholding Tax Applicable Date	1st April 2020
Other Taxes Applicable Date	1st April 2020

View 3 – Earlier date of application to WHT provisions becomes effective for income in the nature of Interest, Dividend and Royalty/FTS and date applicable to other taxes becomes applicable to income earned by Permanent establishment and Independent personal Services	
Withholding Tax Applicable Date	1st April 2020
Other Taxes Applicable Date	1st April 2021

MLI EIF and EIE – Impact – Contd…

(Application for FY 2020-21 for MLI instruments deposited post June 2019 till 31st march 2020)

Extracts from the synthesised text published by India

India – Canada (deposited after 30th June 2019 but before 31 march 2020)

Dates of the deposit of instruments of ratification: 25th June, 2019 for **India** and 29th August, 2019 for **Canada.**

Entry into force of the MLI: 1st October, 2019 for the India and 1st December, 2019 for Canada.
Unless it is stated otherwise elsewhere in this document, the provisions of the MLI have effect with respect to the Agreement: In India:

- for taxes withheld at source on amounts paid or credited to non-residents, where the event giving rise to such taxes occurs on or after 1st April, 2020; and
- for all other taxes levied with respect to taxable periods beginning on or after 1st April, 2021.

India – Japan (deposited before 30th June 2019)

The MLI enters into force for Japan on January 1, 2019 and for India on October 1, 2019 and has effect as follows:

The provisions of the MLI shall have effect in each Contracting State with respect to the Convention:
In India

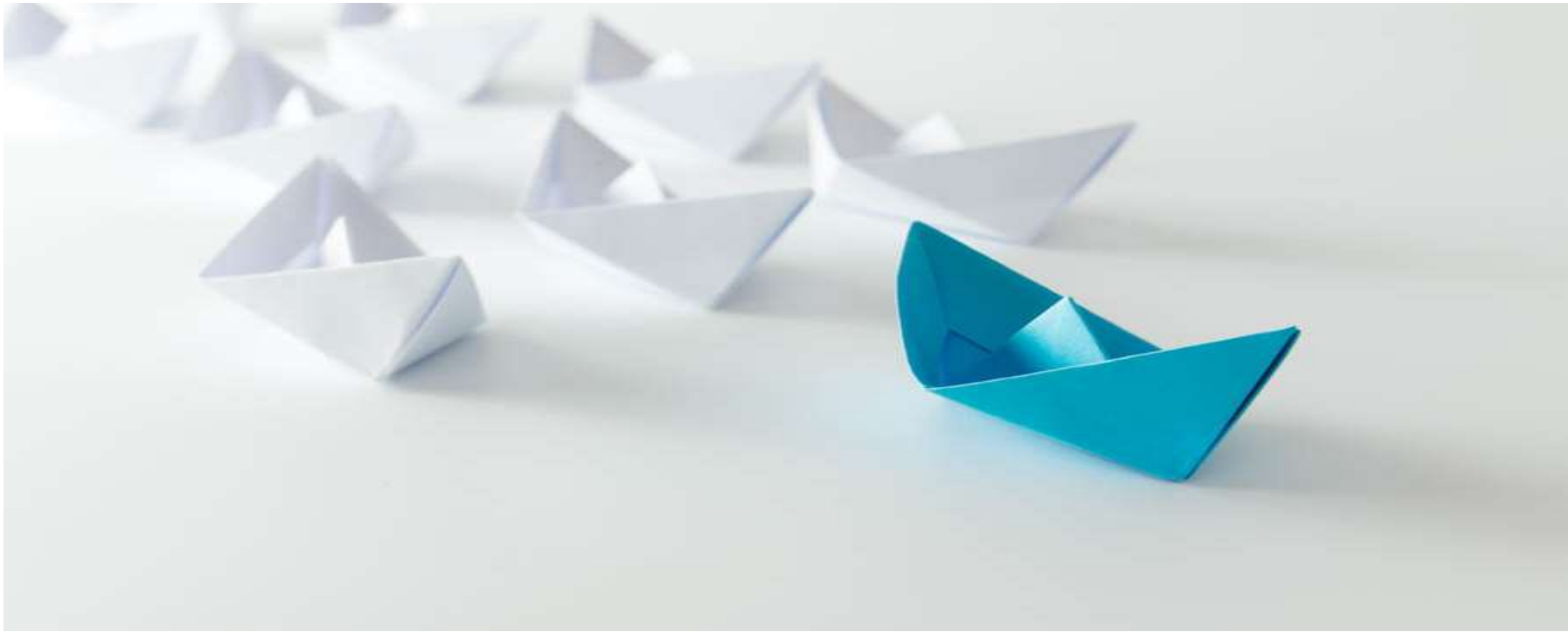
- with respect to taxes withheld at source on amounts paid or credited to non-residents, where the event giving rise to such taxes occurs on or after April 1, 2020; and
- with respect to all other taxes levied by India, for taxes levied with respect to taxable periods beginning on or after April 1, 2020.

Recently amended & important DTAAs

Sr. No.	Country	Amendment Date
1.	Mauritius	August 2016
2.	Singapore	December 2016
3.	Cyprus	March 2017
4.	China	November 2018

Important DTAAs not impacted by MLI

Sr. No.	Country	Reason
1.	USA	MLI not signed
2.	Thailand	MLI not signed
3.	Germany	India not in the CTA list
4.	Hong Kong	India not in the CTA list
5.	China	India not in the CTA list. DTAA re negotiated.
6.	Mauritius	India not in the CTA list
7.	Panama	India not in the CTA list
8.	Isle of Man	India not in the CTA list
9	Switzerland	India not in the CTA list



MLI – Effective application in the context of Indian Treaties

Implementation of BEPS Action Plan – Indian Perspective

Action Plan No.	Action Plan	Implementation in India (through Finance Act)	MLI
1	Digital Economy	Equalization levy – Finance Act 2016 Significant Economic Presence – Finance Act 2018 as amended by FA 2020 – Explanation 2A and 3A	Not applicable
2	Hybrids	-	Incorporated through MLI
3	CFCs	Section 6(3) amendment - Place of Effective Management meets the objective to some extent	Not applicable
4	Interest Deduction	Thin Capitalization Rules Section 94B of the Act Inserted vide Finance Act 2017 –	Not applicable
5	Harmful Tax Practices **Minimum Standard**	Not applicable	Not applicable
6	Prevent treaty abuse **Minimum Standard**	(1) Prevention of Treaty Abuse : Chapter X-A of the Act – GAAR	Preamble to the DTAA and PPT and SLOB Incorporated through MLI

(Contd…)

Implementation of BEPS Action Plan – Indian Perspective

(..Contd.)

Action Plan No.	Action Plan	Implementation in India (through Finance Act)	MLI
7	PE	Definition of Business Connection Widened for DAPE– Finance Act 2018	Incorporated through MLI 1. Widened scope of DAPE 2. Rule P & A activity – main business function 3. Anti-fragmentation rule for preparatory and auxiliary activities 4. Anti-splitting up of contracts rule for EPC
8-10	Transfer pricing	Action plan 8 to 10 provides general guidance on various transfer pricing issues such as transactional profit split method, intangibles, Low value- added intra-group services, cost contribution arrangements, etc. The changes in relation to Action Plan 8-10 are not implemented specifically in Indian Income Tax Act, except insertion of low value adding intra group services in safe harbor rules.	Not applicable

Implementation of BEPS Action Plan – Indian Perspective

(..Contd.)

Action Plan No.	Action Plan	Implementation in India (through Finance Act)	MLI
11	BEPS Data analysis	Not applicable	Not applicable
12	Aggressive Tax Planning disclosure	Not applicable	Not applicable
13	Transfer Pricing documentation & CBC **Minimum Standard**	CBC Reporting Implemented vide Finance Act 2016	Not applicable
14	Dispute Resolution Map & Arbitration **Minimum Standard**	Rule 44G and Form 34F introduced vide notification dated 6th May 2020	Included in MLI
15	Multilateral Instrument	Not applicable	Entered into force.

MLI – Structure and India Positions (Final)

Part	Article	Article and Brief Description	India Position
I – Scope and Interpretation	1	Scope of Convention (General)	NA
	2	Interpretation of Terms	India has notified a list of 93 Covered Tax Agreements. In the final list , India has not included China, but included Hong Kong
II – Hybrid Mismatches	3	Transparent Entities	Does not apply in entirety to its CTAs
	4	Dual Resident Entities	Applies to all CTAs
	5	Application of Methods for Elimination of Double Taxation	In the provisional list, India indicated article not to apply. In the final list , India chose Option C chosen to apply to CTAs

(Contd…)

MLI – Structure and India Positions (Final)

(..Contd.)

Part	Article	Article and Brief Description	India Position
III – Treaty Abuse	6	Purpose of Covered Tax Agreement (Minimum Standard)	Silent, Minimum standard, applicable
	7	Prevention of Treaty Abuse (Minimum Standard)	In the provisional list, India opted for PPT+SLOB. In the final list, Principal Purpose Test opted for as an Interim measure and intends to apply Simplified LOB through bilateral negotiations wherever possible. As an optional provision, India choose to follow SLOB.
	8	Dividend Transfer Transactions - Additional criteria of 365 days minimum holding period	To apply to all CTAs except Portugal
	9	Capital Gains from Alienation of Shares Or Interests of Entities Deriving Value principally from Immoveable Property	To apply to all CTAs
	10	Anti-Abuse Rule for Pes situated in Third Jurisdictions	Silent, thus construed as applicable
	11	Application of Tax Agreements to restrict party's right to tax its own residents	Silent, thus construed as applicable

MLI – Structure and India Positions (final)

(..Contd.)

Part	Article	Article and Brief Description	India Position
IV – Avoidance of Permanent Establishment Status	12	Artificial Avoidance of PE status through Commissionaire Arrangements and other strategies	To apply to its CTAs
	13	Artificial Avoidance of PE status through specific activity exemption	To apply Option A to its CTAs
	14	Splitting up of Contracts	Silent, thus construed as applicable
	15	Definition of closely related enterprise	Silent, thus construed as applicable
V – Improving Dispute Resolution	16	Mutual Agreement Procedure (Minimum Standard)	India has reserved 1st sentence of 16(1). India has notified for rest of the article.
	17	Corresponding Adjustments	Intends to apply this Clause . Reservations to exclude CTAs containing similar provisions (most Indian treaties do contain this clause)

MLI – Structure and India Positions (final)

(..Contd.)

Part	Article	Article and Brief Description	India Position
VI– Arbitration	18 - 26	Choice to apply Part IV	India has opted not to apply this Part in entirety
VII- Final Provisions	27-39	Effect of Provisions of MLI	Substitute taxable period for calendar year for withholding tax. The position remains the same in the interim and final list. However India had notified optional relevant date in the provisional list, which is deleted in the final list.

MLI – PE clause changes

Nature of amendment proposed
Article - 12Artificial Avoidance of Permanent Establishment Status through Commissionnaire Arrangements and Similar Strategies where a person is acting in a Contracting Jurisdiction to a Covered Tax Agreement on behalf of an enterprise and, in doing so, habitually concludes contracts, or habitually plays the principal role leading to the conclusion of contracts that are routinely concluded without material modification by the enterprise, and these contracts are: a) in the name of the enterprise; or b) for the transfer of the ownership of, or for the granting of the right to use, property owned by that enterprise or that the enterprise has the right to use; or c) for the provision of services by that enterprise,
Article 13 – Artificial Avoidance of Permanent Establishment Status through the Specific Activity Exemptions and Anti Fragmentation *Option A – each activity to satisfy P&A activity exemption* *Option B – existing article remains same and any new activity to be inserted should b e P& A activity* **Aggregation of Activity** New anti-fragmentation rule denying P&A activity for avoidance of PE on fulfilment of following conditions *India Chose option A*
Article 14 – Splitting-up of Contracts **Aggregation of Time** Requiring aggregation of time spent by CRE on connected activities at the same site when testing crossing of the period threshold.

MLI – Change in Dividend taxation

Article No. of MLI	Nature of amendment proposed
Article 8 – Dividend Transfer Transactions	Covered Tax Agreement that exempt • dividends paid by a company which is a resident of a Contracting Jurisdiction from tax or that limit the rate at which such dividends may be taxed, • provided that the beneficial owner or the recipient is a company which is a resident of the other Contracting Jurisdiction and • which owns, holds or controls more than a certain amount of the capital, shares, stock, voting power, voting rights or similar ownership interests of the company paying the dividends, • **shall apply only if the ownership conditions described in those provisions are met throughout a 365 day period that includes the day of the payment of the dividends** India has reserved its right for non-applicability of Article 8 in respect of its tax treaty with Portugal (as it already has a 24 month holding period condition) and has notified 21 tax treaties where a holding period of 365 days is proposed to be applicable in order to obtain the benefit of a concessional tax rate on dividends is already present. The article will be Applicable to all other DTAA with India

MLI – Change in Capital Gains

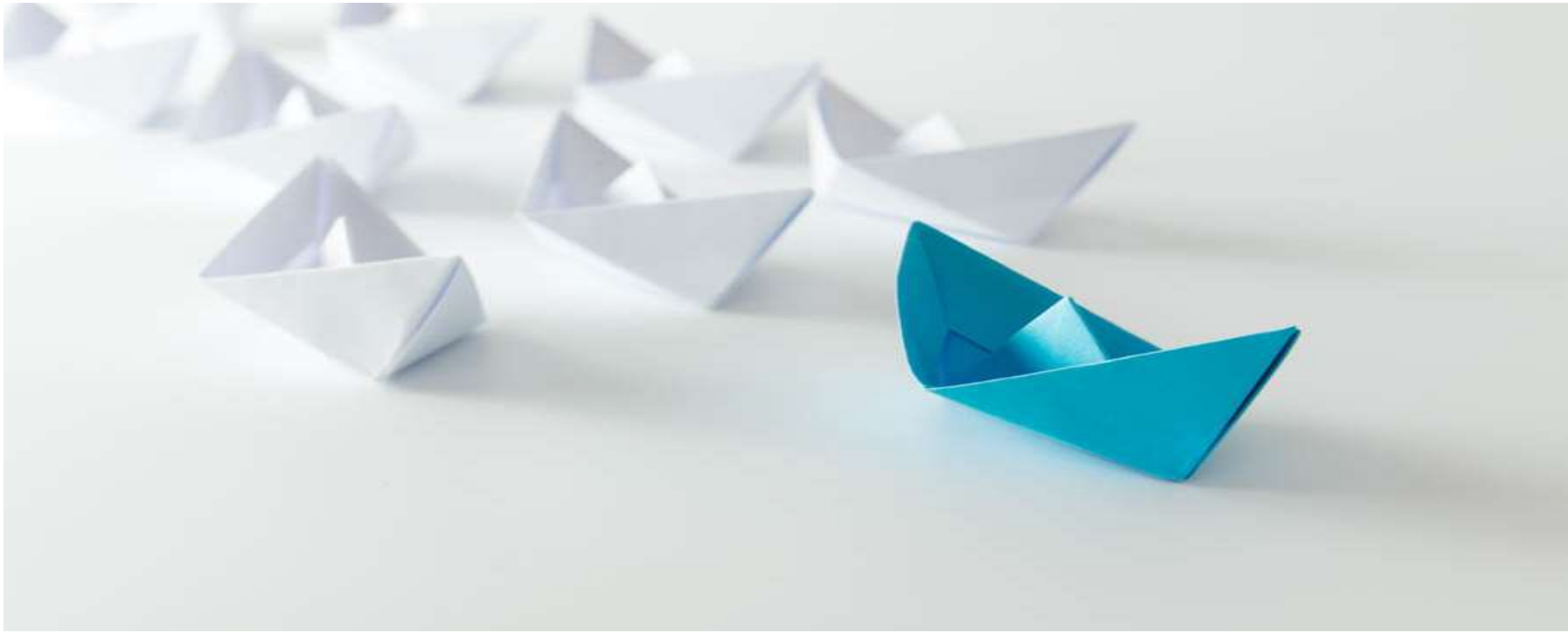
Article No. of MLI	Nature of amendment proposed
Capital Gains from Alienation of Shares of Entities Deriving their Value Principally from Immovable Property	Covered Tax Agreement providing that • gains derived by a resident of a Contracting Jurisdiction from the alienation of shares or other rights of participation in an entity • may be taxed in the other Contracting Jurisdiction provided that these shares or rights derived more than a certain part of their value from immovable property (real property) situated in that other Contracting Jurisdiction (or provided that more than a certain part of the property of the entity consists of such immovable property (real property)): **a) shall apply if the relevant value threshold is met at any time during the 365 days preceding the alienation; and** **b) shall apply to shares or comparable interests, such as interests in a partnership or trust (to the extent that such shares or interests are not already covered) in addition to any shares or rights already covered by the provisions.** India has opted for Alternative 2 in respect of all its CTAs. India seems to have made a policy choice of adopting a value threshold of 50% and a look-back period of 365 days as its default option.

Impact on Indian Treaties – PE clauses

Status as of 28 June 2019						
Country	Deposit Date	Entry Into Force	India covered as CTA?	PE Clause (EAPE)	PE Clause (Activity exemption)	PE clause (contract splitting)
Australia	26-09-2018	01-01-2019	Yes	NA, not opted	Option A, applicable	Silent, construed applies
Austria	22-09-2017	01-07-2018	Yes	NA, not opted	NA, not opted	NA, not opted
France	26-09-2018	01-01-2019	Yes	Applicable	Not to apply	NA, not opted
Israel	13-09-2018	01-01-2019	Yes	Applicable	Option A, to apply	Silent, construed applies
Japan	26-09-2018	01-01-2019	Yes	Applicable	Option A, to apply	NA, not opted
Luxemburg	09-04-2019	01-08-2019	Yes	NA, not opted	NA, not opted	NA, not opted
Netherlands	29-03-2019	01-07-2019	Yes	Not applicable	Option A, to apply	Applicable
New Zealand	27-06-2018	01-10-2018	Yes	Applicable	Option A, to apply	Applicable
Poland	23-01-2018	01-07-2018	Yes	NA, not opted	NA, not opted	NA, not opted
Russia	18-06-2019	01-10-2019	Yes	Applicable	Option A, to apply	Applicable
Singapore	21-12-2018	01-04-2019	Yes	NA, not opted	NA, not opted	NA, not opted
Sweden	22-06-2018	01-10-2018	Yes	NA, not opted	NA, not opted	NA, not opted
UAE	29-05-2019	01-09-2019	Yes	NA, not opted	NA, not opted	NA, not opted
UK	29-06-2018	01-10-2018	Yes	NA, not opted	Yes, present in DTAA	NA, not opted
Mauritius	Mauritius has not covered India in its list of CTA, therefore not applicable					

Impact on Indian Treaties – other income clauses

Status as of 28 June 2019						
Country	Deposit Date	Entry Into Force	India covered as CTA?	Article 8 - Dividend	Article 9(1) – Capital Gains	**Income earned by Transparent entities**
Australia	26-09-2018	01-01-2019	Yes	Not applicable	Applicable	NA. Reservation by India
Austria	22-09-2017	01-07-2018	Yes	Not applicable	Not applicable	NA. Reservation by India
France	26-09-2018	01-01-2019	Yes	Not applicable	Not applicable	NA. Reservation by India
Israel	13-09-2018	01-01-2019	Yes	Not applicable	Not applicable	NA. Reservation by India
Japan	26-09-2018	01-01-2019	Yes	Not applicable	Not applicable	NA. Reservation by India
Luxemburg	09-04-2019	01-08-2019	Yes	Not applicable	Not applicable	NA. Reservation by India
Netherlands	29-03-2019	01-07-2019	Yes	Not applicable	Applicable	NA. Reservation by India
New Zealand	27-06-2018	01-10-2018	Yes	Not applicable	Not applicable	NA. Reservation by India
Russia	18-06-2019	01-10-2019	Yes	Not applicable	Not applicable	NA. Reservation by India
Singapore	21-12-2018	01-04-2019	Yes	Not applicable	Not applicable	NA. Reservation by India
Sweden	22-06-2018	01-10-2018	Yes	Not applicable	Not applicable	NA. Reservation by India
UAE	29-05-2019	01-09-2019	Yes	Not applicable	Not applicable	NA. Reservation by India
UK	29-06-2018	01-10-2018	Yes	Not applicable	Not applicable	NA. Reservation by India
Mauritius	Mauritius has not covered India in its list of CTA, therefore not applicable					



BEPS Action Plan – Implementation through bi-lateral negotiations

BEPS Action Plans –
Implementation through bi-lateral negotiations

Protocol to DTAA IND-CHINA – Signed on 26th Nov. 2018

Relevant Article	Amended Treaty
Preamble	Intending to eliminate double taxation with respect to taxes on income without creating opportunities for nontaxation or reduced taxation through tax evasion or avoidance (including through treaty-shopping arrangements aimed at obtaining reliefs provided in this Agreement for the indirect benefit of residents of third States)
PE (Anti-splitting for Installation PE)	For the sole purpose of determining whether the 183 day period referred to as above has been exceeded, (i)where an enterprise of a Contracting State carries on activities in the other Contracting State at a place that constitutes a building site or construction, installation or assembly project and these activities are carried on during one or more periods of time that in the aggregate do not exceed 183 days, and (ii) connected activities are carried on at the same building site or construction, installation or assembly project during different periods of time, each exceeding 30 days, by one or more enterprises closely related to the first mentioned enterprise, these different periods of time shall be added to the period of time during which the first-mentioned enterprise has carried on activities at that building site or construction, installation or assembly project.

(Contd…)

BEPS Action Plans –
Implementation through bi-lateral negotiations

(..Contd.)

Protocol to DTAA IND-CHINA – Signed on 26th Nov. 2018

Relevant Article	Amended Treaty
Extended Agent PE	(a) habitually concludes contracts, or habitually plays the principal role leading to the conclusion of contracts that are routinely concluded without material modification by the enterprise, and these contracts are (i) in the name of the enterprise, or (ii) for the transfer of the ownership of, or for the granting of the right to use, property owned by that enterprise or that the enterprise has the right to use, or (iii) for the provision of services by that enterprise;
Independent Agent	6. (a) Paragraph 5 shall not apply where the person acting in a Contracting State on behalf of an enterprise of the other Contracting State carries on business in the first-mentioned State as an independent agent and acts for the enterprise in the ordinary course of that business. Where, however, a person acts exclusively or almost exclusively on behalf of one or more enterprises to which it is closely related, that person shall not be considered to be an independent agent within the meaning of this paragraph with respect to any such enterprise.

BEPS Action Plans –
Implementation through bi-lateral negotiations

(..Contd.)

Protocol to DTAA IND-CHINA – Signed on 26th Nov. 2018

Relevant Article	Amended Treaty
Closely related	(b) For the purposes of this Article, a person or enterprise is closely related to an enterprise if, based on all the relevant facts and circumstances, one has control of the other or both are under the control of the same persons or enterprises. In any case, a person or enterprise shall be considered to be closely related to an enterprise if one possesses directly or indirectly more than 50 per cent of the beneficial interest in the other (or, in the case of a company, more than 50 per cent of the aggregate vote and value of the company's shares or of the beneficial equity interest in the company) or if another person or enterprise possesses directly or indirectly more than 50 per cent of the beneficial interest (or, in the case of a company, more than 50 per cent of the aggregate vote and value of the company's shares or of the beneficial equity interest in the company) in the person and the enterprise or in the two enterprises.
Entitlement to Benefits	Notwithstanding the other provisions of this Agreement, a benefit under this Agreement shall not be granted in respect of an item of income if it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit, unless it is established that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of this Agreement.

MLI Impact to Major trading partners

Country	Interest	Dividend	Royalty/FTS	PE	DPS	IPS	Transp. Entities
USA	No Impact	No Impact	No Impact	No Impact	No Impact	No Impact	No Impact
UK	No Impact	No Impact	No Impact	No Impact	No Impact	No Impact	No Impact
Germany	No Impact	No Impact	No Impact	No Impact	No Impact	No Impact	No Impact
Singapore	No Impact	No Impact	No Impact	No Impact	No Impact	No Impact	No Impact
Mauritius	No Impact	No Impact	No Impact	No Impact	No Impact	No Impact	No Impact
France	No Impact	No Impact	No Impact	No Impact	No Impact	No Impact	No Impact
Netherlands	No Impact	Impact Possible	No Impact	Partly	No Impact	No Impact	No Impact
Switzerland	Not CTA	Not CTA	Not CTA	Not CTA	Not CTA	Not CTA	Not CTA
Japan	No Impact	No Impact	No Impact	Impact Possible	No Impact	No Impact	No Impact
Canada	Possible impact	No Impact	No Impact	No Impact	No Impact	No Impact	No Impact
China	No change	No change	No Impact	Possible impact	No Impact	No Impact	No Change

- **Impact due to change in the Preamble and the PPT test is broader in concept which may deny the benefit of the entire DTAA.**
- **Existing Limitation of Benefit of clause and specific anti abuse provisions like beneficial ownership will continue to apply.**

Part III - Applicability of Sect. 195 to specific transactions

Index

1. Payment for Purchase of Software

Nature of Transaction: Indian company makes payment to Foreign company for the purchase of software. The same could be for:

- **Internal use / end use or**
- **Trading purposes (Shrink Wrapped Software / off the shelf software) or**
- **Software embedded in hardware**

In such cases question arises whether the payment is towards the purchase of software (i.e. copyrighted article) and or for the right to use the copyright and thus chargeable to tax as Royalty in India.

Provisions of ITA:

- As per Explanation 2 to 9(1)(vi) any consideration paid for:
  - **Transfer of all or any rights (including granting of any license) in respect of:**
    - Patent, invention, model, design, secret formula or process or trademark or similar property or
    - **Any copyright**, literary, artistic or scientific work including films or video tapes for use in connection with television or tapes for use in connection with radio broadcasting, but not including consideration for the sale, distribution or exhibition of cinematographic films
  - **Use of** any patent, invention, model, design, secret formula or process or trade mark or similar property or
  - **Use or right to use** any industrial, commercial or scientific equipment but not including the amounts referred to in section 44BB

  shall be taxable as Royalty in India

- Explanation 4 to Section 9(1)vi) clarifies that irrespective of the medium through which the **transfer of all or any right for the use or right to use computer software (including granting of license) would take place, the same would be treated as royalty**

Provisions of DTAA

- Royalty means payments of any kind received as a **consideration for the use of, or the right to use**, **any copyright** of literary, artistic or scientific work including cinematograph films, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience.

1. Payment for Software – End Use

Cases in favour of Assessee	Cases against the Assessee
▪ In the case of Infrasoft Ltd [2013] 39 taxmann.com 88 (Delhi), the Delhi High Court examined the difference between the royalty received on sale of a copyright on one hand and the consideration received for transfer of copyrighted articles on the other and ruled that amount received by assessee, a non-resident company, for granting license to use its copyrighted software for licencee's own business purpose only, could not be brought to tax as 'royalty' under article 12(3) of India-US DTAA	▪ Samsung Electronics 345 ITR 494 (Kar) - When licence is granted to make use of software by making copy of same and store it in hard disk of designated computer and to take back-up copy of software, what is transferred is only right to use copy of software for internal business as per terms and conditions of agreement and payment made in that regard would constitute royalty as per section 9(1)(vi), read with article 12 of DTAA between India and USA
▪ M.Tech India (P.) Ltd. [2016] 381 ITR 31 (Delhi HC) - Payments made for purchase of software as a product would be treated as a payment for purchase of software rather than payment for use or right to use software to be considered as royalty	▪ Sonata Information Technology Ltd. (ITA 425 of 2008) Kar. HC - Consideration paid by Indian customers or end users to assessee-foreign supplier, for transfer of right to use software/computer programme in respect of copyrights falls within mischief of 'royalty‘
▪ The Delhi ITAT Special Bench in the case of Motorola Inc, Ericsson Radio Systems AB and Nokia Corporation (95 ITD 269) (Delhi ITAT Special Bench), held that the payments made for transfer of a non-exclusive restricted license in software (not being shrink-wrapped software) is not taxable in India	▪ Autodesk Asia Pte Ltd. [2015] 56 taxmann.com 92 (Bangalore Trib.) - Payment received by assessee a non-resident company for sale of software license to end user customers in India amounts to royalty in hands of assessee
▪ Bartronics India Ltd [2014] 43 taxmann.com 16 (Hyderabad Trib.) - Where assessee engaged in business of providing enterprise solutions based on smart cards, bar coding, biometrics etc., purchased a readymade card operating system software from a foreign company to be used for its business purpose only and without any right of utilizing copyright of said programme, payment made in respect of same did not give rise to any royalty income	▪ ING Vysya Life Insurance Co. (P.) Ltd [2012] 24 taxmann.com 226 (Kar.) - Payment made for the purchase of software was treated as royalty.

The matter is currently pending for adjudication before supreme court

1a. Payment for Software – Trading Purpose

Cases in favour of Assessee	Cases against the Assessee
▪ In the case of Tata Consultancy Services (271 ITR 401), the Supreme Court held that the incorporeal right to software is the copyright which remains with the originator. Canned software (i.e., computer software packages off the shelf) can be termed to be 'goods' ▪ Vinzas Solutions India (P.) Ltd. [2017] 392 ITR 155 (Madras HC) - There is a difference between a transaction of sale of a 'copyrighted article' and one of 'copyright' itself; provision of section 9(1)(vi) as a whole, would stand attracted in case of latter and not former ▪ Delhi HC in Nokia Network OY [TS-700-HC-2012(DEL)] had held that the retrospective amendment to Sec. 9 could not be read into the DTAA. HC relied on Bombay HC ruling Siemens Aktiongesellschaft (310 ITR 320). The same is also followed by Bombay HC in case of M/s. Reliance Infocomm Ltd (INCOME TAX APPEAL NO. 1395 OF 2016). ▪ Trimble Solutions –ITAT Mumbai –Dec 2019 -Distribution of software is like distribution of copyright product and no Royalty	▪ Samsung Electronics 345 ITR 494 (Kar) - When licence is granted to make use of software by making copy of same and store it in hard disk of designated computer and to take back-up copy of software, what is transferred is only right to use copy of software for internal business as per terms and conditions of agreement and payment made in that regard would constitute royalty as per section 9(1)(vi), read with article 12 of DTAA between India and USA ▪ Wipro Ltd, [TS-357-ITAT-2019(Bang)], ITATheld that payment made for purchase of software is Royalty by relying on the decision of the Hon'ble Karnataka High Court in the case of Samsung Electronics Co. Ltd.

The matter is currently pending for adjudication before supreme court

1b. Payment for Software embedded in Hardware

Cases in favour of Assessee	Cases against the Assessee
▪ ZTE Corporation [2017] 392 ITR 80 (Delhi HC) - Where assessee, a China based company, sold telecom equipment's i.e. mobile handsets to various customers in India, since supply of software embedded in telecom equipment enabled use of hardware sold, it resulted in a case of sale of copyrighted article and, thus, payment made towards supply of software was not taxable in India as royalty	▪ Sunray Computers (P.) Ltd (348 ITR 196) Kar. HC - Where assessee having purchased software and hardware from two different non-resident companies, integrated them for manufacture and supply of telecommunication equipment's, in view of fact that assessee's transaction for purchase of software was an independent transaction, payment made for it amounted to royalty under section 9(1)(vi).
▪ .Mumbai Tribunal in Galatea Ltd. v. DCIT [2016] 67 taxmann.com 190 held that where software is supplied predominantly as part of an equipment and if the software loses its identity and the equipment takes over the main objects of the transaction then it has to be treated as transaction of sale and purchase of machine and not as transaction for sale and purchase of software.	▪ AAR ruling in Airport Authority of India In Re 304 ITR 216 supports the apportionment of consideration payable for software in case of a composite contract of supply of hardware and software. The AAR in this ruling noted that though the software was supplied along with the hardware, the supplier had only conferred a license to use the software. The intellectual properties in the software were not transferred to the buyer. Taking these factors into account, the AAR ruled that payment attributable to software would constitute royalty under section 9(1)(vi) as the same is in the nature of consideration for use of copyright in software.
▪ Mumbai Tribunal in Agfa Healthcare N.V. v DCIT 2018] 97 taxmann.com 463 wherein it was held that a separate tax treatment cannot be given to supply of software merely for the reason that (i) invoice contains separate prices for software and equipment and (ii) the time of delivery of software is different form the time of delivery of equipment. The Tribunal held that the dominant and essential character of the transaction in such case is of sale of equipment/machinery.	

The matter is currently pending for adjudication before supreme court

2. Reimbursement of Expenses

Nature of Transaction: Indian company makes payment to Foreign company for general expenses such as insurance, travelling etc incurred on behalf of Indian Company. In such cases question arises whether TDS is applicable on such payments where there is no income element involved? Whether TDS should be deducted if mark up is charged by the Foreign entity for providing the services?

Cases in favour of Assessee	Cases against the Assessee
▪ No TDS on reimbursement of actual expenditure to parent company, since no element of Income - A.P. Moller Maersk [2017] 78 taxmann.com 287 (SC) - CIT vs Siemens Aktiongesellschaft : 310 ITR 320 (Bom HC) - CIT vs. Industrial Engineering product Pvt. Ltd. : 202 ITR 1014 (Del) - HNS India V. Set. Inc. vs. DCIT: 95 ITD 157 (ITAT Del) - United Hotels Ltd. vs. ITO : 93 TTJ 822 (ITAT Del) - Mahindra & Mahindra Ltd. v. Dy. CIT (2009) 30 SOT 374 (Mum - CIT vs. Dunlop Pvt. Ltd. : 142 ITR 493 (Cal) - T-3 Energy Services India (P.) Ltd [2018] 91 taxmann.com 334 (Pune - Trib.)	▪ CIT v. CGI Information Systems & Management Consultants (P) Ltd, (Kar) 226 Taxman 319 - Hon'ble Karnataka High Court held that merely because the agreement provides that the term 'cost' does not include any mark-up and is limited to the actual cost, makes no difference in the eyes of law. Since the ultimate transaction is obtaining license to get the right to use the software though it is styled as 'cost sharing agreement', it is payment towards royalty both as per the provisions of I.T. Act as well as DTAA. ▪ C.U. Inspection (I) P Ltd vs DCIT (ITAT Mum) [2013] 34 taxmann.com 75 – ITAT held where Indian companies were availing services from overseas third party, but payment for these services were being routed through their foreign group companies, in such case TDS applies ▪ SMS Iron Technology (P.) Ltd. v. ITO [2017] 88 taxmann.com 277 (ITAT Delhi) ▪ Similar view was held in AMD Research & Development Centre India (P) Ltd. v. DCIT (ITAT, Hyd) 115 DTR 273 and ITO v. F.L Smidth Ltd. (ITAT, Chennai) 51 taxmann.com 90.

3. Export Commission

Cases in favour of Assessee	Cases against the Assessee
▪ Honourable Supreme Court in the case of CIT vs. Toshoku Limited [1980] 125 ITR 525 (SC) in the context of export commission earned by non-resident has held that the commission earned by the non-resident for acting as the selling agent for the Indian exporter does not accrue in India, wherein such non-resident was rendering services from outside India. ▪ Hon'ble Madras HC in the case of CIT v. Faizan Shoes (P.) Ltd [2014] 48 taxmann.com 48 (Madras) has held that the non-resident agent does not provide technical services for the purposes of running of the business of the assessee in India. The services rendered by the non resident agent can at best be called as a service for completion of the export commitment. Therefore, the commission paid to the non-resident agent will not fall within the definition of 'fees for technical service. Section 9 is not applicable to the case on hand and consequently, section 195 of the Act does not come into play ▪ Bombay HC in case of Gujarat Reclaim & Rubber Products Ltd [TS-732-HC-2015(BOM)] had held that assessee (an Indian co.) was not liable to deduct TDS u/s 195 on commission payments to non-resident agents in respect of sales made outside India ▪ Delhi High Court in the case of CIT v. EON Technology (P.) Ltd. [2011] 203 Taxman 266/15 taxmann.com 391 and also the Coordinate bench decision in the case of Armayesh Global v. ACIT (supra), the income of the non-resident cannot be considered as accrued or arisen or deemed to accrue or arise in India as the services of the said agents were rendered/utilized outside India and the commission was also payable/paid outside India. ▪ Evolv Clothing Co. (P.) Ltd. [2018] 94 taxmann.com 449 (Madras) - If service of market survey rendered by foreign agents is only incidental to function of commission agent, it cannot be regarded as FTS	▪ Smt. Fathima Harris [TS-390-HC-2017(MAD)] - HC confirmed ITAT order and concluded that the commission payments received by the Indian agent on behalf of the Hong Kong entity, in India were taxable in India and thus, provisions of Sec. 40(a)(i) were applicable ▪ Hical Infra Private Limited [TS-252-ITAT-2019(Bang)]- Export commission constitutes FTS as foreign agents engaged in 'quality check' ➢ Shri Jogendra L. Bhati [TS-183-ITAT-2019(Ahd)] - Market survey charges for exploring new business - FTS liable for TDS u/s. 195 ➢ TNT Express Worldwide (UK) Limited [TS-253-ITAT-2016(Bang)] - amount received by UK resident from its Indian affiliate under Management and Administration Services (MSA) agreement (for rendering services such as business policy advice, market research, market analysis, evaluation of business opportunities, management information, etc.) constitutes royalty towards supply of commercial information concerning commercial experience under both IT Act as well treaty

4. Lawyer's Fees

Cases in favour of Assessee	Cases against the Assessee
▪ Mira Exim Ltd [2017] 81 taxmann.com 303 (Delhi - Trib.) - the payee who an individual is rendering such professional or independent personal services is only taxable under Article-14 in Germany where he is resident. The payment has been made to foreign payee abroad for the services rendered outside India. Since income itself was not chargeable to tax in India, therefore, there was no liability of the assessee to deduct tax u/s 195(1) ▪ Kotak Mahindra Bank Limited [TS-528-ITAT-2016(Mum)] – ITAT held that legal fees payment was made with a view to carry on business outside India and create a new source of income outside India, ITAT holds that payment falls within the exceptions under Sec 9(1)(vi) / (vii) and hence, not taxable as royalty/FTS under the Act. With respect to applicability of DTAA, ITAT held that since it has obtained legal services, Article 15 ('Independent Professional Services') being more specific in nature shall apply over Article 13 (dealing with royalty / FTS) as services were rendered outside India and no employee of UK firm were present in India for more than 90 days and thus concludes that payment not taxable in India as per DTAA ▪ Ershisanye Construction Group India (P.) Ltd. [2017] 84 taxmann.com 108 (Kolkata - Trib.) – ITAT held that article 14 would apply in so far as payments made to Hunan Law is concerned and since the condition precedent for taxing such receipts in the hands of Hunan Law in India are not satisfied, the said payment is not chargeable to tax in India in the hands of Hunan Law and, therefore, there was no obligation on the part of the assessee to deduct tax at source under section 195. ▪ Linklaters LLP [TS-36-ITAT-2017(Mum)]- Linklaters' income (a UK based LLP engaged in providing legal/consultancy services) from rendering consultancy services to India-based clients, not FTS or IPS (since LLP is not an individual) – remanded back the matter to analyse whether the LLP has PE in India.	▪ Shriram Capital Limited [TS-178-HC-2020(MAD)]- Madras HC rules in favour of Revenue, holds that services rendered by an Indonesian Law Firm [NR] in respect of the proposed acquisition of an Indonesian Insurance company by assessee [an Indian co.], constitutes 'consultancy services' and hence taxable as FTS u/s. 9(1)(vii)(b) of the Income-tax Act. ▪ Sri Subhatosh Majumder [TS-117-ITAT-2020(Kol)] – ITAT rules that fees paid by assessee (a Patent attorney in India) to various foreign attorneys w.r.t. consultancy on overseas IP law constitutes Fees for Technical Services [FTS] u/s 9(1)(vii) of the Act for AY 2011-12, however remits matter back to AO to examine DTAA benefit / taxability

5. Fees for Access to online Database / Server

Cases in favour of Assessee	Cases against the Assessee
▪ Shell Information Technology International BV [2020] 114 taxmann.com 686 (Mumbai - Trib.) – ITAT held that assessee, a Dutch company, which has entered into Master Service Agreement (MSA) to provide IT services to various entities and provided restricted software/network access and access to software was not for use of any copyright albeit for copyrighted articles during course of providing service, payments received by assessee in pursuance to MSA could not be treated as 'royalty' under article 12(4) of the India-Netherland DTAA ▪ American Chemical Society –Mum AT –April 19- online Journal subscription is not Royalty as the same does not provide any information arising from assessee's previous experience which lies in the creation of / maintaining such information online. By granting access to the journals, the assessee neither shares its experiences, techniques or methodology employed in evolving databases with the users, nor imparts any information relating to them. ▪ EPRSS Prepaid Recharge Services India (P.) Ltd. V. ITO [2018] 100 taxmann.com 52 (Pune - Trib.) - ITAT noted that the assessee does not possess and does not have any control over the server or servers space, being deployed by Amazon, while providing e-services. Further the Assessee made monthly payments to Amazon for using its services, which were not regular, fluctuating and there was no fixed basic price which is a precondition for royalty. Accordingly, ITAT concluded that assessee is not paying for any rights but is only paying for the services, hence it was only for use of technology and cannot be said to be for use of royalty. ▪ DDIT v. Savvis Communication Corporation [2016] 158 ITD 750 (Mumbai ITAT) - A payment cannot be said to be consideration for use of scientific equipment when person making the payment does not have an independent right to use such an equipment and physical access to it. Payment received for providing web hosting services though use of certain scientific equipment cannot be treated as 'consideration for use of, or right to use of, scientific equipment' which is a sine qua non for taxability under section 9(1)(vi), read with Explanation 2 (iva) thereto and also under article 12 of Indo-US DTAA.	▪ Reuters Transaction Services Ltd. [2014] 47 taxmann.com 10 (Mumbai - Trib.) - Allowing the use of software and computer system to have access to the portal of the for finding relevant information and matching their request for purchase and sale of foreign exchange, it amounted to imparting of information concerning technical, industrial, commercial or scientific equipment work, thus taxable as royalty.

6. Expatriate Salary Reimbursement

Nature of Transaction: In a typical secondment scenario, foreign citizen is seconded by F Co. to work in its Indian subsidiary, I Co.

Period of deputation – 3 years
Temporary suspension of employment in home country
Payment of salary in Home country to continue (for administrative convenience, continuance of social security benefits)
Salary paid in home country reimbursed by I CO.
I CO. to arrange for rent free accommodation and company car

Question often arises that whether reimbursement, by an I Co., pertaining to salary cost of seconded employees of F Co. would be taxable as FTS and thus liable to TDS in India?

Important consideration to be verified before considering the taxation of reimbursement of salary paid to expatriate would be as below.

Arguments in favour of non taxation as FTS	Arguments in favour of taxation as FTS
• Co. Foreign Co is not responsible for the actions of the expats. Thus, Foreign Co does not render any technical service to the Indian Co. • Since payment by Indian Co is towards reimbursement of salary cost borne by Foreign Co, no income can be said to accrue to Foreign Co in India. • Indian Co could be regarded as an 'economic employer' of the secondees. Secondment agreement constitutes an independent contract of service. • deputed employees were not subject to the control and supervision of the Foreign Co.	• Foreign Co is the real employer of the secondees as it retains right over the employees and has power to remove/replace them • Pursuant to foreign collaboration agreement, Foreign Co had undertaken to render the services to Indian Co and hence, lent the services of its seconded employees on payment of compensation by Indian Co. • compensation referred to in the secondment agreement was for rendering 'services of technical or other personnel' — hence taxable as FTS and liable to withholding of tax u/s.195

Analysis of the facts of the case is extremely crucial!!!

6. Expatriate Salary Reimbursement

Cases in favour of Assessee	Cases in favour of Revenue
▪ DIT v. Marks & Spencer Reliance India (P.) Ltd. [IT Appeal No. 893 of 2014] (Bom. HC) - held that when the seconded employees were deputed for providing assistance in management and set up of business, and worked under direct control, management and supervision of the taxpayer, the services would not be in nature of FTS under the India-UK DTAA and further the said services would not make ▪ available technical skills, know how to the taxpayer. ▪ Morgan Stanley Asia (Singapore) Pte. V. DDIT (IT) [2018] 95 taxmann.com 165 (Mumbai - Trib.) held that for each deputed person, the amount received by it is income chargeable under the head "salary" and therefore, it cannot be termed as "fees for technical services“ ▪ Burt Hill Design (P.) Ltd. v. Dy. DIT (IT) [2017] 79 taxmann.com 459 (Ahd. ITAT) ▪ DIT v. HCL Infosystem Ltd. [2005] 274 ITR 261 (Delhi HC) ▪ IDS Software Solutions (India) (P.) Ltd. v. ITO (Intl Tax) [2009] 32 SOT 25 (URO) (Bang ITAT), ▪ Dy. DIT v. Tekmark Global Solutions LLC [2010] 38 SOT 7 (Mumbai ITAT)	▪ Centrica India Offshore (P.) Ltd. v. CIT [2014] 364 ITR 336 ▪ Food World Supermarkets Ltd. v. DDIT (IT) [2015] 63 taxmann.com 43 (Bang. – Trib.) ▪ Panasonic Corporation v. DCIT (IT) - Tribunal upheld the action of the AO by observing that the deputed employees were reporting to the assessee through the Vice Presidents and Presidents and the deputed employees had to work under the direction, control and supervision of the assessee under the Act as well under the India-Japan DTAA as it made available technical knowledge to the subsidiary in India.

7. Online Advertising

Equalisation Levy (Introduced by Finance Act 2016)

- Chapter VIII of the Finance Act, 2016 had introduced **equalisation levy @ 6%** on the amount of consideration paid to non-residents for specified services in the form of
  - **online advertisement and**
  - **provision of digital advertising space or**
  - **other services related to online advertisement**.
- The incomes, which are subject to equalisation levy, are exempt in the hands of the non-resident recipients under section 10(50) of the ITA
- Thus, in cases where the payment to non resident is subjected to equalisation levy the same should not liable for TDS under ITA from FY 2016-17.

Explanation 3A inserted in Section 9 of Income tax Act 1961

Explanation 3A.—For the removal of doubts, it is hereby declared that the income attributable to the operations carried out in India, as referred to in Explanation 1, shall include income from such advertisement which targets

- a customer who resides in India or
- a customer who accesses the advertisement through internet protocol address located in India;

Therefore if a resident person engaged in business and profession makes a payment to Non resident for online advertisement, there could be overlap between EL payable @ 6% and amount of income taxable as per first limb of explanation 3A of Section 9 of ITA.

Possible solution could be to treat EL as an independent charge. On payment of EL, the income is not taxable under ITA. To the extent the income is exempt U/s 10(50), income should not be taxable as per explanation 3A.

7. Online Advertising

Cases in favour of Assessee	Cases against the Assessee
▪ DIT v. Sheraton International Inc [2009] 313 ITR 267/178 Taxman 84 (Delhi) - The use of trademark, trade name etc. in rendering of advertisement, publicity and sales promotion services is neither in the nature of royalty nor fee for technical services. ▪ Reebok India Company [2017] 79 taxmann.com 271 (Delhi - Trib.) - Ppayment made by assessee to ICC as 'Rights fee' was exclusively for use of Marks of ICC for purposes of promotion and advertisement and not for manufacture and sale of licensed products, hence, not in nature of 'Royalty' or 'Fees for technical services' ▪ Right Florists (P.) Ltd. [2013] 32 taxmann.com 99 (Kolkata - Trib.) Online advertising fees paid to foreign search engine company is not fees for technical services and is not taxable in India due to absence of permanent establishment of such foreign company in India	▪ Google India (P.) Ltd. - [2018] 93 taxmann.com 183 (Bangalore - Trib.) - Where assessee-Google India made payment to Irish company-GIL for purchasing of advertisement space under Google-USA's AdWords programme for resale to advertisers in India as also for post-sales services that included usage of trademarks, IPRs, brand features, derivative works and other intangibles owned by Irish company GIL, consideration so paid would be royalty liable to tax under section 9(1)(vi)

8. Technical Consultant Fees

Nature of Transaction: Indian companies generally avails the technical consultancy services from Foreign companies. Question often arises whether such services are taxable in India and thus liable for TDS? What will happen in cases where make available benefit is available in the DTAA?

Provisions of ITA:

- As per Section 9(1)(vii) any consideration paid for rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personnel) shall be taxable as Fees for Technical Services under ITA

Provisions of DTAA:

- Article 12 generally deals with Fees for Technical Services. Fees for Technical Services means payments of any amount in consideration for the services of managerial, technical or consultancy nature, including the provision of services by technical or other personnel.

- Article 14 generally dealing with Independent Personnel services (applicable in case of individuals) prescribes that the income earned by the non resident individual from the performance of professional services or other independent activities of a similar character shall be taxable only in the country in which he is a resident excepts he performs in other country through fixed base or period exceeding the threshold mentioned in the DTAA. **In case of individual providing technical services, Article 14 being specific shall prevail over Article 12.**

Meaning of consultancy services	Meaning Technical services	Meaning of managerial services
SC in GVK Industries (2015) –Meaning of Consultancy Services explained	SC in Bharti Cellular (2010) –Human element critical as the term technical is between consultancy and managerial service	SC in R. Dalmia (1977) –Meaning of Managerial services

8. Technical Consultant Fees – FTS / IPS

Cases in favour of Assessee	Cases against the Assessee
▪ ABC Bearing Ltd. [TS-23-ITAT-2017(Mum)] - Notes that services provided by both the individuals fell under the ambit of 'independent personal services' ('IPS') and their stay in India was less than 183 days; Observes that even when payments within the purview of IPS are treated as FTS, such payment shall be liable to be taxed under Article governing IPS and not FTS under the relevant clauses of DTAA ▪ Susanto Purnamo - [2016] 73 taxmann.com 108 (Ahmedabad - Trib.) - Software development services rendered by assessee, resident of US, to design, build and maintain a complete video streaming website and all of its administrative applications to Indian company are in nature of professional services specifically covered by article 15 of DTAA between India and USA ▪ BSR & Company [2016] 72 taxmann.com 12 (Mumbai - Trib.) Professional services rendered to Indian company by overseas companies outside India in relation to audit and taxation would be independent professional services; and in absence of any PE in India of these companies, payment made to them would not be chargeable to tax in India ▪ Hydrosult Inc [TS-43-ITAT-2019(Ahd)] - ITAT rules that consultancy fees payment by assessee to foreign consultants in relation to irrigation development project awarded by Govt. of India, falls under the ambit of Article 14 instead of FTS article of respective DTAAs on IPS. ITAT grants benefit under Article 14 and holds that payments not taxable in India. ▪ Poddar Pigments Ltd. [2019] 107 taxmann.com 422 (Delhi - Trib.) - Where scientific services were rendered by two Swiss scientists to assessee-company, these were covered under Article 14 which deals with independent personal activities and no tax was required to be deducted at source from said payments	▪ Device Driven (India) (P.) Ltd. Where assessee-company, engaged in development and sale of software, paid export commission to its non-resident director, in view of fact that said director had to assist assessee-company in all respects and, moreover, he had to ensure that necessary modifications were carried out in software to make it suitable to requirements of customers, payment made to 'B' constituted 'independent personal services' taxable in India under article 14 of India - Switzerland DTAA and, thus, assessee was liable to deduct tax at source while making said payments

9. Dividend Payments

Nature of Transaction: Indian subsidiary companies as a cash repatriation method pay dividend to Foreign Holding companies on their equity contribution in India. Until last year dividend payments were subject to Dividend Distribution Tax ('DDT') in India. However, Finance Act 2020 has abolished the DDT system and has reintroduce the classical system of taxation of dividends in the hands of the shareholders with effect from 1 April 2020.

Provisions of ITA:

- As per Section 195, any person paying to non –resident interest or any other sum chargeable under the ITA shall at the time of credit or payment whichever is earlier deduct income tax at the rates in force. Thus dividend payments will now be covered by the Section 195 and TDS is ought to be deducted on the same as per the rates prescribed in the Finance Act or DTAA. The rates provided in the finance Act for withholding of tax on dividend is 20%. The benefit of reduced rate of taxation as per DTAA rate is possible subject to PAN and TRC. Please note that the relaxation of Pan as per Rule 37 BC does not apply to dividend transactions.

Provisions of DTAA:

- The non-resident shareholders would be paying tax on the dividend income as per the rate prescribed under the relevant DTAAs, which may vary from 5, 10 or 15% if the non-resident is the beneficial owner of the same.

- **Beneficial Ownership:** Circular No.789 dated 13.4.2000 of CBDT issued by the Central Board of Direct Taxes in context of the India-Mauritius DTAA linked beneficial ownership to tax residency and clarified that a Tax Residency Certificate (TRC) was sufficient evidence for accepting the status of residence as well as beneficial ownership. The validity of the circular has been confirmed by the Supreme Court of India (SC) in its decision in the case of Union of India v Azadi Bachao [2003] 263 ITR 706. This was subsequently followed by High Court in the case of Universal International Music BV [TS-24-ITAT-2011(Mum)]

- **Impact of amendments proposed to be inserted by the provisions of the Multi lateral Instruments for dividend transfer transactions needs to be verified before availing the exemption or reduced rate as per the DTAA as amended by MLI.**

No amendment to Rule 37BC exempting from PAN relaxations

10. Payment under EPC Contract

Nature of Transaction: Foreign Company under the Engineering, Procurement and Construction (EPC) contracts generally supply the goods i.e. equipment from their home country as well as renders the services in relation to construction / installation at the project site in India. Question generally arises whether the payment made for the purchase of goods is liable to tax in India?

Broadly EPC contract can includes following nature of transactions.

- **Offshore supplies** **Offshore services** **Onshore supplies** **Onshore services**

Honourable SC in Ishikawajima Harima heavy industries Ltd [2007] 288 ITR 408 held that The Supreme Court in this regard observed as follows: - "The fact that it has been fashioned as a turnkey contract by itself may not be of much significance. **The project is a turnkey project. The contract may also be a turnkey contract, but the same by itself would not mean that even for the purpose of taxability the entire contract must be considered to be an integrated one so as to make the appellant to pay tax in India**. The taxable events in execution of a contract may arise at several stages in several years. The liability of the parties may also arise at several stages. Obligations under the contract are distinct ones. Supply obligation is distinct and separate from service obligation. Price for each of the component of the contract is separate. Similarly offshore supply and offshore services have separately been dealt with. Prices in each of the segment are also different."

Honourable SC in Hyundai Heavy Industries Co. Ltd noted that The said contract was in two parts. One was for fabrication of platform in Korea and the other was installation and commissioning of said platform in Bombay High. Honourable Sc followed the principles given the judgment of Ishikawajima Harima heavy industries Ltd . **Additionally it sated that even if one would assume that the supplies were necessary for the purposes of installation (activity of the PE in India) and even if it was assumed that the supplies were an integral part, still no part of profits on such supplies could be attributed to the independent PE unless it was established by the department that the supplies were not at arm's length price. No such taxability could arise in the instant case as the sales were directly billed to the Indian Customer (ONGC**). No such taxability could also arise in the instant case as there was no allegation made by the department that the price at which billing was done for the supplies included any element for the services rendered by the PE. Therefore, the profits that accrued to the Korean GE for the Korean operations were not taxable in India.

10. Payment under EPC Contract

- Transfer of title outside India and the impact of acceptance test in India

Delhi High Court in Ericsson's case (DIT v. Ericsson A.B. 343 ITR 470) held that the performance of the acceptance test in India is not to be considered a relevant circumstance whilst determining whether any part of the profit on the offshore supply is chargeable to tax as income from business connection in India.

The relevant observations of the High Court are as under:

"We, find that the terms of contract make it clear that acceptance test is not a material event for passing of the title and risk in the equipment supplied. It is because of the reason that even if such test found out that the system did not conform to the contractive parameters, as per article 21.1 of the Supply Contract, the only consequence would be that the Cellular Operator would be entitled to call upon the assessee to cure the defect by repairing or replacing the defective part. If there was delay caused due to the acceptance test not being complied with, Article 19 of the Supply Contract provided for damages. Thus, the taxable event took place outside India with the passing of the property from seller to buyer and acceptance test was not determinative of this factor. The position might have been different if the buyer had the right to reject the equipment on the failure of the acceptance test carried out in India."

Transfer of title outside India and the impact of payment terms in India

LG Cable Ltd. [2011] 197 Taxman 100 (Delhi) - Mere fact that 15 per cent of the payment was to be retained by the PGCIL to be paid 30 days after operational acceptance on erection and completion of the system cannot be construed to mean that the title in the goods did not pass to the buyer in the country of origin. (Para 29)

10. Payment under EPC Contract

Cases in favour of Assessee	Cases against the Assessee
▪ Ishikawajima Harima heavy industries Ltd [2007] 288 ITR 408 - Since all parts of the transaction in question, i.e. the transfer of property in goods as well as the payment, were carried out **outside the Indian soil, the transaction could not have been taxed in India** ▪ DIT vs. Ericsson A.B. (343 ITR 470) (Del) (HC) - Clause (a) of Explanation-1 lays down that in the case of business if all the operations are not carried out India, the income of business that is deemed to accrue or arise in India would be only such part of the income as is reasonably attributable to operations carried out in India. In view of the aforesaid discussion, it is clear that under the supply contract, the assessee has not earned any income in India through or from any business connection. [Para 47] ▪ DIT vs. Nokia Networks OY (358 ITR 259) (Del)(HC) where assessee supplied both hardware and software manufactured in Finland to Indian telecom operators from outside India on a principal to principal basis under independent buyer/seller arrangements and installation activities were undertaken by its Indian subsidiary, consideration for supply of software was not taxable as 'royalty'	▪ Shanghai Electric Group Co. Ltd [2017] 84 taxmann.com 44 (Delhi - Trib.) - The dominant intention of the parties was to set up a power plant in India. - Assessee was having complete control over the goods inclusive of Risk while in transit as well as once Equipment's reaches the respective site - payments are linked with the different stages like signing of contract, raising of invoice, submission of invoice for advance payments, submission of advance bank guarantee, submission of performance bank guarantee, design, drawing, successful commissioning of power plant. - intention of parties is that the property in BTG equipments will pass only when it reached the project site and is successfully put to function without any defect. It is for that reason that assessee gives Performance Bank Guarantee and Advance Bank Guarantee to Owners of the project, much before any payment is made to assesse Thus held that the supply of goods is taxable in India Voith Paper GmbH TS-103-ITAT-2020(DEL) - ITAT, after taking into account the features of the contracts, held that offshore supply as taxable in India

11. Interest on Overdue Payments

Nature of Transaction: Foreign holding companies generally grants credit facility to their Indian companies while making payments for purchase of machinery / good / services from them. In turn, foreign companies charges interest on such credit facility. A question arises whether the interest which is charged on delayed payments partake the character of purchase price in essence and thus should not be liable to tax in India as Interest?

Provisions of ITA:

- As per Sect. 115A(1)(a)(ii) read with section 195 of the ITA, where the total income of a foreign company includes any income by way of interest received from an Indian Concern on monies borrowed or debt incurred by Indian Concern, taxes shall be withheld @ 20% at the time of payment or credit of such interest.
- Interest is in turn defined by Sect. 2(28A) ITA to mean “interest payable in any manner in respect of any moneys borrowed or debt incurred (including a deposit, claim or other similar right or obligation) and includes any service fee or other charge in respect of the moneys borrowed or debt incurred or in respect of any credit facility which has not been utilized”

Provisions of DTAA:

- As per Article 11 Interest means “income from debt-claims of every kind, whether or not secured by mortgage and whether or not carrying a right to participate in the debtor's profits, and in particular, income from Government securities and income from bonds or debentures, including premiums and prizes attaching to such securities, bonds or debentures. **Penalty charges for late payment shall not be regarded as interest for the purpose of this Article**.
- The definition of Interest in the DTAA IND-GER is narrower than the ITA definition and does not include a similar terminology as that of the ITA [i.e. service fee or other charge in respect of the moneys borrowed or debt incurred].

11. Interest on Overdue Payments

Cases in favour of Assessee	Cases against the Assessee
▪ Bombay Steam Navigation Co. (1953) (P.) Ltd. vs Commissioner of Income-tax [1965] 56 ITR 52 (SC) observed that “the amount of unpaid price can never be said to be a loan advanced by the non-resident company to the assessee-company. The Supreme Court observed that an agreement to pay the balance consideration due by the purchaser does not give rise to a loan. A loan of money undoubtedly results in a debt, but every debt does not involve a loan. Liability to pay a debt may arise from diverse sources, and a loan is only one of such sources. Every creditor who is entitled to receive a debt cannot be regarded as a lender”.	▪ CIT vs.Vijay Ship Breaking Corporation [2003] 129 Taxman 120 (Guj), “The meaning of the word "interest" is, thus, very wide and would include interest on unpaid purchase price payable in any manner which would include payable by means of irrevocable letter of credit. Therefore, debt is incurred by the buyer of the purchase price which he is obliged to pay. The debt arises from the unwillingness or inability to pay cash down when the purchase price becomes payable against delivery, and the engagement to pay it at a later date or by instalments. Thus, usance interest paid by the assessees was not any part of the purchase price of the ships and was interest within the meaning of the definition of the term ‘interest’ under section 2(28A) of the Income-tax Act, 1961”.
▪ Saurashtra Cement & Chemical Industries Ltd. [1975] 101 ITR 502 (GUJ.), also opined favourably in the context of interest on unpaid purchase price. The High Court observed that “in view of the clear-cut pronouncement of the Supreme Court, it is obvious that the amount of the unpaid price cannot be said to be a loan advanced by the non-resident company to the assessee-company nor can the non-resident company be said to be a lender to the assessee-company so far as that amount was concerned. Since the non-resident company cannot be said to have lent the amount of the unpaid purchase price to the assessee-company either in cash or in kind, there is no question of the interest payable by the assessee-company to the non-resident company being deemed to be "income" accruing or arising from any money lent at interest and brought into India in kind”/	▪ This decision was relied upon by the Panaji Tribunal in the case of ACIT vs. Bhavani Enterprises, [2014] 52 taxmann.com 489 and Indian Furniture Products Ltd. [2015] 53 taxmann.com 440 and by the Mumbai Tribunal in the case of Uniflex Cables Ltd. [2012] 19 taxmann.com 315 (Mum.).
▪ Visakhapatnam Port Trust, has held that “We are of the opinion that the interest agreed to be paid along with each of the instalments of unpaid purchase money was agreed to be part of the sale consideration itself and cannot be treated as an independent 'source' of income. The words 'any other form of indebtedness from sources' in the other territory can only mean interest arising or accruing as a separate 'source' of income. It cannot include interest payable on the unpaid purchase money agreed to be part of the sale consideration. There is nothing in the initial contract or any novation converting the interest payable with the instalments as a 'loan'.” [1983] 15 Taxman 72 (AP)	▪ ACIT v. Overseas Trading and Shipping Co. (P.) Ltd. [2018] 99 taxmann.com 136 (Rajkot - Trib.) where it was held that “usance interest paid by assessee-company to its holding company for delayed payment for purchase of goods was not part of purchase price of goods but same was 'interest' within meaning of section 2(28A) and assessee was liable to deduct TDS on same under section 195(1)”.

12. Cost Sharing Arrangements

Cases in favour of Assessee	Cases against the Assessee
▪ **A.P. Moller Maersk A S 392 ITR 186 (SC)] -** Where assessee, a foreign shipping company, set up a telecommunication system in order to enable its agents across globe including India to perform their role more effectively, payment received for providing said facility was not taxable as fee for technical services ▪ **Dunlop Rubber Co Ltd (142 ITR 493) Calcutta High Court -** Payments made by the Indian subsidiary to its parent company for recoupment of the research expenditure incurred for obtaining the technical data which was jointly obtained and the expenditure was shared jointly together hence, the payments received by the foreign parent company were not liable to tax ▪ **DECTA (237 ITR 190) AAR** Contribution towards the cost of services was not really payment to a foreign company but to a common fund to enable it to defray a part of the expenditure of the project carried out by such foreign company on behalf of the participating company hence it is neither income under the Act nor the India-UK tax treaty. ▪ **ABB Ltd. (322 ITR 564)] -** Mere reimbursement of costs based on a cost contribution agreement does not constitute income and hence the same is not liable to withholding tax under section 195 of the Act. The AAR further ruled that the cost contribution arrangement lacks the service element and therefore, the payment cannot be treated as fees for technical services ▪ **CSC Technology Singapore Pte Ltd vs ADIT -** Cost-sharing arrangements for recoupment of other expenses such as software license costs and intranet charges have been held to be not taxable in the hands of the entity initially incurring such expenses.	▪ **A Systems (345 ITR 479) AAR -** A group of company enters into an agreement to carry out the research and development programme. As per the agreement, each member shall individually spend on research and development, and allow other to use the product on payment of consideration. The consideration, though described as allocation of cost, is actually royalty as it is paid on use of product of research and not otherwise. Hence, taxable as royalty under Article 12 of India-Germany DTAA and section 9(1)(vi)

13. FTS – Make Available

Nature of Transaction: Indian companies avails IT support services / training services from foreign companies. A question often arises that whether such services are taxable as FTS in case Make Available benefit is available in DTAA?

Provisions of ITA:

- As per Section 9(1)(vii) any consideration paid for rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personnel) shall be taxable as Fees for Technical Services under ITA

Provisions of DTAA:

- Article 12 generally deals with Fees for Technical Services. Fees for Technical Services means payments of any amount in consideration for the services of managerial, technical or consultancy nature, including the provision of services by technical or other personnel.

- **Further Make Available clause under DTAA restricts / narrows the scope of taxation of FTS in India**. (For ex. INDIA–USA DTAA). As per Technical Explanation to IND-USA DTAA - technology will be considered "made available" when the person acquiring the service is enabled to apply the technology. The fact that the provision of the service may require technical input by the person providing the service does not per se mean that technical knowledge, skills, etc., are made available to the person purchasing the service. Thus, though the services are technical in nature unless and until the same are made available to person acquiring the services the services wont be taxed as FTS in India as per the DTAA.

- Article 14 generally dealing with Independent Personnel services (applicable in case of individuals) prescribes that the income earned by the non resident individual from the performance of professional services or other independent activities of a similar character shall be taxable only in the country in which he is a resident excepts he performs in other country through fixed base or period exceeding the threshold mentioned in the DTAA. **In case of individual providing technical services, Article 14 being specific shall prevail over Article 12.**

Explanation given in IND – USA DTAA memorandum of understanding for explaining the concept of make available can be used for interpretation for other DTAAs as well
Reference – 2003 ITAT Kolkatta – CESC Ltd. & 2008 AAR in Intertek Testing Services Private Limited

13. FTS – Make Available

Cases in favour of Assessee

- In the case of C.E.S.C Ltd vs. DCIT [2003] (275 ITR 15) (Kolkata ITAT) and Intertek Testing Services India Pvt. Ltd., [2008] (175 Taxman 375) (AAR) it has been held that the explanation as provided in the MOU to the India-US DTAA should be equally applicable to all other DTAAs India has entered into wherein the “make available” criteria is provided
- (2017) 162 ITD 586 (Ahmedabad ITAT) - Similarly, the fact that the Indian entity/ customer immensely benefitted from the services, even resulting in value addition to the employees of the assessee, is irrelevant. This has been observed in the case of DCIT v. Bombardier Transportation India (P.) Ltd
- Soregam SA v. DDIT [2019] 101 taxmann.com 94 (Delhi - Trib.) ITAT noted that Interpretation of 'make available' is that the person acquiring the services is enabled to **apply the technology contained therein on his own in future without recourse to the service provider**; and knowledge must remain with service recipient once service has ended, i.e., some sort of durability or permanency of the result must remain once service is rendered; as well as service recipient is at liberty to use the technical knowledge, skill, know-how and processes. In the context of IT support services, it concluded that there is no evidence that these services satisfy test of ‘make available’.
- Renaissance Services BV [[2018] 94 taxmann.com 465 (Mumbai - Trib.)] - TAT accepted the assessee’s contention that the training services provided to the management level personnel were in the nature of general managerial/ leadership training and the same did neither involve ‘make available’ or transfer of any technology to the personnel. Relying on Veeda Clinic Research P. Ltd it concluded that training services being in the nature of managerial/leadership training, could not have been assessed as FTS.

Cases against the Assessee

- Sahara Airlines vs. DCIT [2002] (83 ITD 11) (Delhi ITAT) Payment for providing training to crew members taxable as FTS, make available is satisfied
- Hindalco Industries Ltd vs. ACIT [2005] (94 TTJ 944) (Mumbai ITAT) - Technical assistance to enable service recipient to design, construct and operate a plant to manufacture aluminum and Training for application of technical know how taxable as FTS
- Gentex Merchants (P.) Ltd vs. DDIT [2005] (94 ITD 211) (Kolkata ITAT) - Provision of Schematic ideas along with technical designs, drawings and information, on basis of which assessee was to execute and install water features

14. FTS – No Human element

Cases in favour of Assessee

- Supreme Court in CIT v. Bharti Cellular Ltd [2010] 193 Taxman 97 – Upheld Delhi HC order – Since both 'managerial and consultancy' services are provided by humans, applying the rule of '*noscitura sociis',* the word 'technical' would also have to be construed as involving a human element. Expression 'technical service' would have reference to only technical service rendered by a human and would not include any service provided by machines or robots.
- Kotak Securities Ltd [2016] 67 taxmann.com 356 (SC) Service made available by Bombay Stock Exchange [BSE Online Trading (BOLT) System] for which transaction charges are paid by members of BSE are common services that every member of Stock Exchange is necessarily required to avail of to carry out trading in securities in Stock Exchange; such services do not amount to 'technical services' provided by Stock Exchange, not being services specifically sought for by user or consumer and, therefore, no TDS would be deductible under section 194J on payments made for such services
- Siemens Ltd v. CIT(A) [2013] 30 taxmann.com 200 observed "..if any technology or machine developed by human and put to operation automatically, wherein it operates without any much of human interface or intervention, then usage of such technology cannot per se be held as rendering of "technical services" by human skills. It is obvious that in such a situation some human involvement could be there but it is not a constant endeavour of the human in the process.."
- Metro & Metro v. ADIT [2013] 39 taxmann.com 26 observed *"..it is not a question of more of, or less of, human involvement. It is, in our humble understanding, the question of presence of or absence of human involvement..."*
- Atos Information Technology HK Ltd. [2017] 79 taxmann.com 26 (Mumbai - Trib.)- Services provided through standard facility cannot be reckoned as rendering of technical services in absence of imparting of any technical knowledge.

THANK YOU!!!

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